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No. 822

IN THE

Supreme Court of the United States

October Term, 1965

THOMAS E. ENGLAND,

Petitioner,

v.

AUTOMATIC CANTEEN COMPANY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. .....

THOMAS E. ENGLAND,

Petitioner,

vs.

AUTOMATIC CANTEEN OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered into the above case on the 20th day of July, 1965.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio, Eastern Division is, as far as petitioner has been able to determine, unreported. A copy thereof is attached as Exhibit A. The opinion of the Court of Appeals for the Sixth Circuit is reported at 349 Fed 988 (1965), and a copy thereof is attached as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on July 20, 1965. On October 25, 1965 an order of this Court extended time in which

petitioner might file a motion for writ of certiorari in this case to and including December 17, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) When an individual plaintiff joins with other individual plaintiffs in an anti-trust action based on a single course of conduct similarly involving all plaintiffs, is the defense of Res Judicata thereafter available to the defendant with respect to *all* existing anti-trust actions by each individual plaintiff based on conduct relating only to each individual plaintiff and not to the plaintiffs in common?

(2) Can the defense of Res Judicata bar a claim based on conduct first occurring *after* a prior action was filed, even though between the same Plaintiff and the same defendant?

(3) Can the defense of Res Judicata bar a claim based on a course of conduct occurring *after* a prior action was filed, even though a similar course of conduct had occurred before the prior action was filed?

(4) Can the defense of Res Judicata bar a separate cause of action?

STATUTES AND REGULATIONS INVOLVED

This case involves a consideration of the policies supporting the federal anti-trust laws in Title 15, United States Code, and Rule 18 (a) of the Federal Rules of Civil Procedure which reads as follows:

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the de-

fendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

STATEMENT OF THE CASE

This is a request that a writ of certiorari issue to review a judgment affirming a summary judgment granted the Defendant-Respondent, Automatic Canteen of America, under Rule 56 on the doctrine of res judicata. The facts of this case which are not in dispute are the following:

Since 1937, Petitioner, England, had operated a vending business in Ohio under "distributor's" agreements with Automatic Canteen Company of America. These agreements provided that Automatic would furnish England with all candy, gum and nuts required by him for resale through vending machines leased from Automatic, and that England would be required to purchase from Automatic his said requirements.

Prior to 1943, England purchased solely from Automatic the products he sold through the vending machines which he leased from Automatic. During the war years 1943-1945, Automatic was unable to supply England with the product he required, so he had to purchase these items from other sources at higher prices than those provided in the contract. Notwithstanding its failure to perform its own contract, Automatic required a payment from England based upon

the amounts of candy, gum and nuts purchased by him in the open market.

In 1943, the Federal Trade Commission filed a complaint against Automatic Canteen, charging that provisions of its franchise agreements were in violation of Section 3 of the Clayton Act (15 U.S.C. sec. 14). Automatic, during the period of this investigation of anti-trust violation, ostensibly permitted England to purchase candy from other sources, but was secretly and surreptitiously engaged in diverse activities to prevent England from acquiring candy, etc., from sources other than through the respondent, Automatic Canteen.

In connection with its efforts to force its distributors generally to pay Automatic the benefits which hitherto had accrued to it when performing its contract, yet without assuming the burdens of contract performance, Automatic organized Swan Candy Co., a wholly-owned subsidiary.

The distributors countered by forming a Distributors' Association, and in 1946 fourteen of the leading distributors, including England, filed two suits in Chicago against Automatic and Swan Candy, under the anti-trust laws.

Case No. 46 C2018 dealt with the conspiracy between Automatic and Swan Candy to control and monopolize the sale and distribution of candy, gum and nuts. The monopoly sought and the coercion applied were in this broad field, but the conspiracy and the machinery attacked by the distributors, including England, was the Swan Candy Co. conspiracy.

Case No. 46 C4020 dealt only with the actions of Automatic and Swan Candy in coercing the distributors, including England, into paying Automatic for the privilege of buying products from other trade sources.

Automatic then began eliminating the distributor plaintiffs one by one. The businesses of some were bought out. Some were settled out by new franchises.

Ultimately, England, whose residence and business were in Ohio, was the only plaintiff left. Staring him in the face were lengthy interrogatories. He was not able to sustain the burden alone and sought dismissal of the case without prejudice. When Judge LaBuy refused, he consented instead to a dismissal of the case with prejudice. Other than the results which must necessarily flow from such a dismissal, no other determination of fact or adjudication of law was made in the two *Swan Candy* cases.

The application to dismiss was filed November 23, 1948. The dismissal entry in Chicago was dated in March, 1949, and stamped April 4, 1949. On March 29, 1949 the instant case was filed in the United States District Court for the Southern District of Ohio. Because of the nature of Judge LaBuy's order, England made no claim in this case based on the Swan Candy conspiracy. Several of his complaints were emphatically related to him individually, such as discrimination in furnishing new and larger equipment, delay in filling orders, and refusal to permit him to sell his franchised operations.

After other motions running the gamut of motion practice, on April 8, 1963, Automatic filed a motion in the District Court for summary judgment on the ground that the dismissal of the Chicago cases with prejudice was *res judicata*. Despite petitioner's arguments that the dismissed cases involved multiple plaintiffs and that several of the matters giving rise to the instant case occurred after the Chicago cases were filed, and even after the motion to dismiss was filed, the District Court granted summary judg-

ment, ruling the dismissed Chicago cases were *res judicata* as to all issues which were raised or *might have been raised by each and every plaintiff*.

On appeal from the summary judgment order the Sixth Circuit Court of Appeals on July 20, 1965 affirmed the District Court, indicating that the fact that all events occurred before the dismissal of the Chicago cases was ground enough to grant the motion for summary judgment.

REASONS FOR GRANTING THE WRIT

This case is of substantial importance both to the administration of the anti-trust laws and to the future application of the doctrine of *res judicata*. Here the District Court and the Court of Appeals, completely disregarding the facts as well as the multiple plaintiff status of a dismissed case, declared such dismissal to be *res judicata* not only as to all claims the various plaintiffs pleaded jointly, but also as to all other causes of action *each individual might have brought* had he been alone in the dismissed case, even including causes of action arising between the date of the motion to dismiss without prejudice and the date of the order dismissing with prejudice.

Generally followed, the rulings below will discourage victims of a monopoly from banding together to bring a civil anti-trust action. Petitioner submits that the significance of this case to two important areas of federal interest, the error in the decisions of the courts below, and the necessity for rulings on these points of uniform nationwide applicability call for review by this Court.

1. As this Court noted in *Leh v. General Petroleum Corp.* (November 8, 1965), a case decided this term, it was the

belief of Congress "that private anti-trust litigation is one of the surest weapons for effective enforcement of the anti-trust laws". The anti-trust laws themselves show the clear intent of Congress, as pointed out in H. R. Rep. No. 627, 63rd Cong. 14, "to help persons of small means who are injured in their property or business by combinations or corporations violating the anti-trust laws." Yet, in holding that a dismissal in an anti-trust suit involving several plaintiffs is *res judicata* to all causes of action which any individual plaintiff could have raised before the dismissal, the lower courts have effectively thwarted this expressed intent of Congress. Clearly, no small franchise owner would join with others similarly situated to bring an anti-trust action, knowing that he must bring into the common forum all his individual causes of action, and that each of his co-plaintiffs are under similar pressure to add to the collage his own separate causes of action—and that this compulsion will continue to face each plaintiff until the day of trial or dismissal. The perils, not to mention the costs, of such a requirement would give pause to even the hardiest of small businessmen.

Moreover, in a situation where multiple plaintiffs bring an anti-trust action, to require each plaintiff to set up not only the cause he has in common with his co-plaintiffs, but every cause he might individually have against the defendant is to put the case in chaotic condition. Anti-trust actions at best are complicated and tend to exhaust the capacities of the small businesses they are designed to help. A ruling such as that of the courts below, if allowed to stand, would add confusion to the complexity, and as the court is well aware, confusion leads only to the benefit to the defendant in any case, and especially in an anti-trust case.

In addition, a large defendant can confront non-resident plaintiffs with the prospect of pursuing their continuing claims at great expense in an inconvenient forum, against a larger and wealthier defendant. Surely such a result is contrary to the intent of Congress to aid those individuals of limited means in bringing this kind of suit.

While *res judicata* is itself a doctrine of public policy based on the necessity of putting an end to litigation, it is not, as was stated in *E. E. Souther Iron Co. v. Woodruff Realty Co.*, 175 Mo. App. 246, 158 S.W. 69, "a fetish before which all defenses must bow down." The considerations underlying the doctrine may be outweighed by countervailing considerations of public policy of another nature. Cf. *Anno* 88 LEd 389; 1 B *Moores Fed. Prac.* 783 ff. In anti-trust litigation the expressed policy is to favor the weak rather than the strong and to encourage valid treble damage suits by private parties. The object of the Federal Rules of Civil Procedure is to simplify pleading and bring a clear-cut issue before the court. Petitioner submits that in such a situation the doctrine of *res judicata* should be cautiously applied and that it was not so applied by the lower courts. The ruling of the Circuit Court of Appeals then controverts the expressed intent of Congress because it discourages small businessmen from instituting the statutorily-allowed treble damage actions by increasing the expense, compounding the complexity, and playing into the hands of the wealthier party, all of which work to the benefit of a defendant in an anti-trust suit. Clearly, the decisions affect an area of grave national interest and call for review by this court.

2. The decisions of both the District Court and the Court of Appeals are in error, for both courts extend the holding

of this Court in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), beyond what was ever intended by this Court.

In the *Lawlor* case, this Court was presented with a series of anti-trust violations. Defendants therein claimed that a judgment dismissing a suit with prejudice as to the earlier violations was *res judicata* as to later violations of the same kind. This Court held, at pages 327-28, that a course of conduct "may frequently give rise to more than a single cause of action. And so it is here", and, at page 329, that "a prior judgment is *res judicata* only to suits involving the *same* cause of action". These holdings were all that were necessary to decide the *Lawlor* case and so constitute the rule of the case.

But the Court of Appeals in the instant case, overlooked this decision in *Lawlor* and elevated certain dicta in the case to constitute a rule of law. In *Lawlor* this Court noted that, "The conduct presently complained of was all subsequent to the 1943 judgment." The Court of Appeals and the District Court no doubt assumed that by this language *Lawlor* meant that the date on which a judgment was rendered determined whether or not a defendant's continued acts gave rise to a new cause of action. Accordingly, the District Court and the Court of Appeals in the instant case held that plaintiff was barred by the doctrine of *res judicata*, *not* because the acts complained of were the same acts as those which were the subject of the dismissed suit, *but only* because "all matters in the present case were alleged to have occurred at a time *prior* to the dismissal of the Chicago cases. . . ." Thus, the Court of Appeals made the existence of a cause of action dependent not upon similar facts, but

only upon the date of a judgment. This holding clearly overlooks the main point of the *Lawlor* case and exalts the dicta.

If carried to its logical conclusion, the decision of the two lower courts would grant a giant enterprise license to commit numerous monopolistic activities against an individual. For example, pending a decision on a plaintiff's motion to dismiss without prejudice, which decision on the motion could take a year or two, a defendant-monopoly could fail to deliver goods in a timely manner and in the correct amounts; it could raise costs of goods unilaterally, or demand tie in sales, or slander, or otherwise damage a plaintiff and be absolved of any act even though clearly actionable under the anti-trust laws, because it was smart enough to so commit these "causes of action" while a motion was pending. Consider a dispute between General Motors and its thousands of franchise holders. In any suit brought by the franchise holders they would, under the present ruling in this case, be obliged to plead every cause of action each and every one had which existed or might arise before ultimate judgment or dismissal even though they themselves might have moved to dismiss. During the pendency of the suit, the giant corporation is given, in effect, carte blanche to engage in a multitude of harassing activities which must, under the instant case below, be pleaded by each victim unles he wishes to risk losing his cause of action. In the instant case, plaintiff's motion to dismiss without prejudice was filed on November 23, 1943; the dismissal with prejudice occurred on April 5, 1949, leaving a period of over four months during which plaintiff was, by the decisions below, under compulsion to supplement his complaint on the one

hand while on the other moving for its dismissal, without prejudice if possible.

Clearly, under Rule 18 of the Federal Rules of Civil Procedure, a plaintiff can, if it chooses, bring one, two, or more separate causes of action in a single suit, but *need not* do so. Just as clearly, if a plaintiff brings only one cause of action, any judgment rendered in the case is *res judicata* only to that cause of action. However, the Court of Appeals in applying the doctrine of *res judicata* here based its determination solely on the fact that all matters complained of occurred prior to the Chicago judgment. Time, and not the particular facts in issue, seems to have been the salient factor. Petitioner submits that the erroneous ruling below in this case, if allowed to stand, will extend the ruling of *Lawlor* far beyond anything intended by this Court and will make mandatory the now permissive joinder of claims presently allowed under Rule 18 of the Federal Rules of Civil Procedure.

3. The ruling below in the instant case affects not only the enforcement of the anti-trust laws, but will have a nationwide effect on the rules of civil procedure. Because of the need for uniformity in both these areas, petitioner submits that the court should review this case. Petitioner recognizes that the opinions below offer a very minimum of explanation for the decision, and hard as it may be for this plaintiff to be denied review for this reason, the scantiness of the doctrine revealed in the opinions must be considered in judging their importance. Anti-trust cases are usually of such consequence that the factual patterns of applicable cases are exhaustively investigated in applying even the barest legal pronouncement, and experience indi-

cates that the brevity of the opinions below will not prevent them from establishing the precedents which the petitioner here urges the Court to reverse.

CONCLUSION

Petitioner respectfully requests that this Court take this case for review and issue its writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

/s/ LYMAN BROWNFIELD
/s/ PHILIP K. FOLK
/s/ VICTOR S. KRUPMAN
/s/ JOHN J. DILENSCHNEIDER
Attorneys for Petitioner

EXHIBIT A

CIVIL NO. 2430

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

— ORDER —

(Filed February 11, 1964)

This matter is before the Court upon the motion of defendant, Automatic Canteen Company of America, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

Briefly stated, it is the contention of the defendant that the cause of action asserted by plaintiff in the instant case is barred under the doctrine of res judicata because of cases filed by plaintiff and others in the Federal District Court in Chicago in 1946. Those Chicago cases were subsequently dismissed with prejudice.

It is clear that the dismissal with prejudice of the Chicago cases is res judicata as to all issues between plaintiff and defendant which were raised or might have been litigated in those cases. *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 479 (1930), *Esquire, Inc. v. Varga Enterprise, Inc.*, 185 F.2d. 14, 17 (7 Cir. 1950) and *Cleveland v. Higgins*, 148 F.2d. 722, 724 (2 Cir. 1945) cert. denied, 326 U.S. 722 (1945).

The Court has examined the allegations contained in the complaints of the Chicago cases and those in the complaint

of the instant case and finds that the instant case is barred under the doctrine of res judicata.

Accordingly defendant's motion for summary judgment is hereby SUSTAINED.

The Clerk shall enter judgment forthwith; no entry of counsel required.

/s/ CARL A. WEINMAN,
Chief Judge, U. S. District Court.

EXHIBIT B

No. 15,914

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

THOMAS E. ENGLAND,
Plaintiff-Appellant,
vs.
AUTOMATIC CANTEEN COMPANY OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided July 20, 1965.

(Filed July 20, 1965)

Before PHILLIPS, Circuit Judge, MCALLISTER, Senior Circuit Judge, and MACHROWICZ, District Judge.[1]

PER CURIAM. In 1946 appellant England joined with thirteen other plaintiffs in filing two suits against appellee, referred to herein as Automatic Canteen, in the U. S. District Court for the Northern District of Illinois, Eastern Division, at Chicago, seeking treble damages under the anti-trust laws, 15 U.S.C. §§ 1, 2, 4 and 15. After these suits had been dismissed as to the other thirteen plaintiffs, an

[1] Judge Thaddeus M. Machrowicz of the United States District Court for the Eastern District of Michigan, sitting by designation.

order was entered by the Court in Chicago on April 4, 1949, dismissing England's suits "with prejudice."

On March 29, 1949, six days before the dismissal of his suits in Chicago, England filed his complaint in the present case seeking to recover treble damages against Automatic Canteen under the anti-trust laws.

Under date of February 11, 1964, the district court sustained the motion of Automatic Canteen for summary judgment on the ground that the dismissal with prejudice of England's Chicago cases is res judicata as to all issues between the parties which were raised or might have been litigated in those cases. England has appealed from the summary judgment order.

An examination of the court files shows that the same matters were set forth in the complaints in the Chicago case and the present case; and that all matters complained of in the present case were alleged to have occurred at a time prior to the dismissal of the Chicago cases in 1949, no post 1949 events being charged in the pleadings in the present case.

A dismissal of a suit with prejudice bars a subsequent action seeking the same relief. *Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163 (C.A. 6). We agree with the district court that the dismissal of the Chicago cases with prejudice bars the present case under the doctrine of res judicata. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322; *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470; *Esquire, Inc. v. Varga Enterprises, Inc.*, 185 F.2d 14 (C.A. 7); *Cleveland v. Higgins*, 148 F.2d 722 (C.A. 2), cert. denied, 326 U.S. 722.

The judgment of the district court is affirmed.